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**4. Master and Servant (§ 303\*)—Railroad Liable for Death by Malicious Act of Unfit Watchman.**—Where gates at railroad crossing were closed, and watchman, incensed by request that he raise the gates, began firing, causing death, the railroad was liable where the employee was not a fit person for the position.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 729.]

**5. Master and Servant (§ 330 (3)\*)—Evidence Held to Show Negligence in Employing Unfit Watchman.**—In an action against a railroad for death occasioned by malicious act of watchman at crossing by means of a pistol evidence held to sustain finding that the railroad was negligent in employing an unfit person for the position.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 729.]

Error to Circuit Court of City of Norfolk.

Action by E. S. Merrill, administrator of Claudia Harrell, deceased, against John Barton Payne, Director General of Railroads, predecessor of J. C. Davis, Director General of Railroads and Agent under section 206 of the Transportation Act of 1920. Judgment for plaintiff, and the latter brings error. Affirmed.

*Hughes, Little & Seawell*, of Norfolk, and *F. M. Rivinus*, of Philadelphia, Pa., for plaintiff in error.

*Tazewell Taylor*, of Norfolk, and *H. R. Leary*, of Edenton, N. C., for defendant in error.

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MOORE v. KERNACHAN et al.

June 15, 1922.

[112 S. E. 632.]

**1. Depositions (§ 108\*)—Objections to Competency of Witness Not Brought to Attention of Court Waived.**—Objections on the taking of a deposition to the competency of a witness were waived where not brought to the attention of the court at the hearing.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 928.]

**2. Conversion (§ 15 (1)\*)—Setting Aside Land as Fund for Payment of Debts Effected a Conversion.**—A clause in a will setting aside certain land as a primary fund for the payment of debts effected an equitable conversion of the land, at least to the extent necessary to pay the debts.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 500.]

**3. Conversion (§ 1\*)—Nature of Doctrine.**—The doctrine of equitable conversion is a pure creature of equity, unknown to the law, and is a mere incident or application of the maxim that equity treats that as done which ought to be done.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 499.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**4. Conversion (§ 15 (1)\*)—In Determining Question whether Will Effected Conversion, Intent of Testator Governs.**—In determining whether will effected equitable conversion, and extent thereof, the object is to ascertain the intention of the testator from a consideration of the will as a whole.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 501.]

**5. Conversion (§ 15 (1)\*)—Direction to Convert Land into Money Treated as Conversion.**—A direction in a will to convert land into money will be treated as a conversion.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 500.]

**6. Conversion (§ 15 (3)\*)—Where Purpose of Conversion of Testator Has Failed, the Property Goes to Heir or Next of Kin.**—When the purpose of the testator as disclosed by his will has failed, or is incapable of accomplishment, the property retains its original character, and goes to the heirs or next of kin as the case may be.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 501.]

**7. Conversion (§ 15 (1)\*)—No Presumption of Intent to Effect Conversion.**—A testator may direct that his land shall be converted into money, out and out, for all purposes, and a court of equity will respect the direction, as the testator's will is supreme in the premises; but there is no presumption of such an intent, and its existence must be gathered from the will when read as a whole.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 501.]

**8. Conversion (§ 15 (3)\*)—Ceases Pro Tanto or Altogether on Total or Partial Failure of Bequest.**—Where there has been a total or partial failure of the specific bequest for which the conversion was directed, the conversion will cease altogether or pro tanto, as the case may be.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 500.]

**9. Conversion (§ 18\*)—Clause Held to Only Effect Partial Conversion.**—A clause in a will, "it is my wish that all my debts be first paid, for which I leave fifty acres of the best timber land east of the house," held to constitute the land a primary fund for the payment of debts, and that, so far as necessary for the payment of such debts, such 50 acres was converted into money, but no further, and that the surplus, if any, after the payment of such debts, passed as land under another clause of the will.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 501.]

**10. Wills (§ 820 (4)\*)—Cost of Administration Held Not "Debt" within Meaning of Will.**—Under a clause in a will constituting certain land a primary fund for the payment of debts, costs of administration were not "debts."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt. For other cases, see 13 Va.-W. Va. Enc. Dig. 780.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Appeal from Circuit Court, Mecklenburg County.

Suit by S. T. Moore, in his own right, as executor of the estate of E. A. Moore, deceased, against one Kernachan and others. From a decree, plaintiff appeals. Reversed and remanded.

*Chas. T. Reekes*, of Boydton, *L. Berkley Cox*, of Norfolk, and *S. S. P. Patteson*, of Richmond, for appellants.

*Hiram Wall*, of South Hill, and *Irby Turnbull*, of Boydton, for appellees.

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ALTAVISTA COTTON MILLS, Inc. v. LANE.

June 15, 1922.

[112 S. E. 637.]

**1. Appeal and Error (§ 882 (12)\*)—Defendant, Having Raised Issue of Implied Contract, Could Not Complain of Plaintiff's Instruction Thereon.**—In action for services, the defendant, having raised the issue of whether there was an implied contract by its answer and by instruction given by the court in its request, could not complain of plaintiff's instruction on such issue on the ground that plaintiff did not sue upon an implied contract.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

**2. Trial (§ 251 (9)\*)—Refusal to Instruct that Plaintiff Could Not Recover for Certain Losses Not Constituting an Issue in the Case Held Not Error.**—In action for services rendered in financing the corporation, in which the jury were properly instructed as to the proper measure of damages, refusal to instruct that plaintiff could not recover losses suffered through his connection with transactions of other concerns where recovery of such losses was not an issue in the case held not error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 604.]

**3. Appeal and Error (§ 882 (12)\*)—Amendment of Defendant's Instruction Containing Same Proposition as Another of Defendant's Instruction Granted Held Not Reversible Error.**—Amendment of defendant's instruction containing practically the same proposition as was embodied in one of defendant's instructions which was granted by the court held not reversible error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 604.]

**4. Appeal and Error (§ 1064 (1)\*)—Instruction Allowing Plaintiff Compensation for Certain Services Held Harmless in View of Evidence as to Rendition of Services.**—In action for services rendered in financing defendant corporation, instruction authorizing jury to allow plaintiff for services which materially contributed to placing the business on a sound financial basis, if error, was harmless in view of the corporation's admission that the business was placed on a sound finan-

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.